REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 84 OF 2013

DANIEL MAINA KARIUKI.............APPELLANT

VERSUS

REPUBLIC......................................RESPONDENT

(Appeal against conviction and sentence from the judgment of the Hon.D.N.Musyoka Ag. PM delivered on 28/06/2013 in Criminal Case No.196 of 2010 Karatina)

JUDGMENT

1. The appellant **Daniel MainaKariuki**, was charged with the offence of defilement of a girl contrary to **Section 8(2)** of the **Sexual Offences Act**.The particulars of the charge are that on the 14th day of March, 2010 at [particulars withheld] Village within Nyeri County, the appellant intentionally caused his member to penetrate the private parts of **DKM** a child aged six (6) years.

2. The alternative charge was the offence of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act; the particulars are that on the above date the appellant intentionally touched the private parts of **DKM** a child aged six (6) years.

3. After a full trial, the Appellant was found guilty and was convicted on the main charge and sentenced to life imprisonment.

4. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and listed four (4) grounds of appeal which are summarized *inter alia*;

(i) The Charge Sheet was defective.

(ii) The ‘***voire dire’*** examination was not properly conducted.

(iii) The appellant was not positively identified.

(iv) The case was not proved to the desired threshold.

5. At the hearing hereof the appellant was unrepresented and relied on his written submissions; whereas Ms.Gicheha represented the State and responded by making oral submissions; hereunder is a summary of the parties rival submissions;

APPELLANT’S CASE

6. **On identification**; The appellant’s contention was that the case was entirely dependent on identification; that according to the prosecution witnesses the offence took place at 6.55pm and therefore the existing conditions did not favour correct identification; there was need to treat the evidence of these witnesses on identification with care as they did know the appellant previously;

7. No description of the appellant was made by **PW1** in the first report to the police; the mother’s description of the appellant was what she had been told by **PW1** which evidence amounted to hearsay; there were a lot of contradictions and inconsistencies in the evidence of **PW1, PW2** and **PW3** on identification which according to the evidence of **PW7** could have been cured by the conducting of an identification parade; which parade was never conducted; therefore the identification that was not preceded by advance identification was worthless and could not form the basis of a conviction; case law relied on **CR.APP.No.147 of 2005 Stephen Ndungu vs Republic.**

8. The appellant submitted that the Charge Sheet was defective and that it ought to have included Section 8(1) of the Sexual Offences Act;

also the words '**as read with**" had been omitted from the Charge Sheet; therefore, he had been charged under an erroneous and non-existent section; further the particulars of the offence were also at variance with the evidence adduced by the prosecution and therefore the evidence was not sufficient to sustain a conviction;

9. The appellant also argued that the prosecution failed to prove its case to desired threshold; that there was a lot of hearsay and circumstantial evidence on identification as none of the witnesses saw the appellant committing the actual offence; that the evidence of the doctor (**PW6**) on penetration was scanty and inconclusive as he had stated in his evidence that ***"…….so I can't tell if the hymen was intact or not."***; which would therefore mean that the act of penetration was not proved;

10. This witness did not also indicate the age of the injuries; the appellant relied on the case of **Samuel Ithagi Muhira vs Republic CA No. 113 of 2015 (unreported)** where it was held that a P3 Form that failed to disclose the age of the injury in a case of defilement could not be relied upon to prove the guilt of an accused person;

11. As for the '***voire dire***' examination the trial court did not comply with the set down guidelines; caselaw relied on that sets out these guidelines is the case of **Joseph Opande vs Republic**; and therefore such evidence ought to be excluded entirely from the proceedings; which would mean that in the absence of such evidence there is no evidence upon which a conviction can be based; the appellant relied on the case **JGK vs R [2015] eKLR;**

12. For the forgoing reasons the appellant prayed that his appeal be allowed and that his conviction be quashed, his sentence be set aside and that he be set at liberty.

RESPONDENT'S CASE

13. In response counsel for the respondent opposed the appeal and submitted that that the prosecution had proved the three (3) key elements of the offence of defilement which are identification, age and penetration.

14. On identification counsel stated that the offence took place during the day and the conditions were favourable for identification; **PW2** had given the police a description of the appellant; **PW1** had given a description of the clothes worn by the appellant and was able to identify the clothes which were found in his house; she had also described in detail how she had met the appellant and had narrated how he held her hand and bought her a cake at the shop; he then took her in the opposite direction from home into a maize plantation and defiled her;

15. The evidence of **PW1** on the meeting at the shop and leading her away was corroborated by **PW3** who testified that on the material date he had spotted the appellant at the shopping centre and he gave an identical description as **PW1** of the clothes worn by the appellant; he also confirmed that he had seen the appellant holding the minor's hand and both were headed in the opposite direction from the minor's home;

16. That it was not a case of mistaken identity as the appellant was a person known to **PW3** who testified to having known the appellant for at least two (2) months prior to the incident and stated that he also knew where the appellant worked in the neighborhood;

17. The appellant had contended that the Charge Sheet was defective for only citing Section 8(2) of the Act which provides for the penalty for defilement of a child aged below ten (10) years; in answer counsel submitted that the omission was curable and would occasion no prejudice to the appellant as he had fully understood the charges he was facing and also took part in the proceedings at the trial;

18. That the prosecution had called seven (7) prosecution witnesses to prove their case; that the prosecution had made out a water tight case against the appellant and had proved its case to the desired threshold; on identification **PW3** saw the two together on the material date and positively identified the appellant; **PW7** testified on how the minor pointed out the appellant and that his clothing worn on the material date assisted in his identification; as for penetration, there was sufficient proof of penetration whether partial or complete as provided by Section 2 of the Act; the minor had narrated how the appellant undressed her and did '**bad manners'** to her; counsel cited the proviso to Section 124 of the Evidence Act which provides that there would no need for corroboration of the minors evidence where the court is satisfied that the minor was telling the truth; the doctor **PW6** had examined the minor and had confirmed that the minor's genitalia had bruises and a tear; a high vaginal swab indicated that there was dry blood and pus cells; all these factors confirmed that the minor's private parts had been interfered with; the minor's age was proved by a Birth Certificate which confirmed that she was aged six (6) years at the time of the incident;

19. Lastly counsel submitted that the '***voire dire***' was properly conducted; the trial court questioned the minor and wrote the answers as set down by the law and made a conclusion that the minor was seized of sufficient intelligence to go through the trial; the minor was affirmed and testified and the trial court had good reason to believe her evidence;

20. The prosecution had proved the three (3) elements of defilement; the appellant was positively identified; age was proved and the minor's private parts had been interfered with; defilement was proved to the desired threshold

21. In conclusion counsel prayed for the dismissal of the appellant's appeal as it was unmerited; and that the conviction and sentence be upheld.

ISSUES FOR DETERMINATION

22. After taking into consideration the submissions of both the Appellant and Respondent this court has framed the following issues for determination;

i) Whether the Charge Sheet was fatally defective;

ii) Whether the trial court conducted the *'voire dire'* examination properly

iii) Whether the prosecution proved its case to the desired threshold;

iv) Whether the sentence was manifestly harsh and excessive in the circumstances;

ANALYSIS

23. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okenovs Republic (1972) EA 32.**

Whether the Charge Sheet was fatally defective;

24. The Appellant submitted that with the omission of the words ***"as read with"*** the Charge Sheet was rendered defective; that Section 8(2) does not exist as a charge in the Sexual Offences Act; therefore, the offence he was charged with was not disclosed;

25. The court record indeed shows that the Charge Sheet reads that the Appellant was charged under Section 8(2) of the Sexual Offences Act which is the penalty section; and that there was an omission of the words **"as read with"**; but upon perusal of the contents of Statement of Facts this court notes that these were set out in clear and unambiguous terms and sufficiently disclosed and established the nature of the offence that the Appellant was faced with as required by Section 134 of the Criminal Procedure Code;

26. The record also shows that the Appellant answered to the charge, he followed the entire proceedings and appreciated the evidence tendered against him and that he was able to cross-examine all the prosecution witnesses; and was able to prepare his defence and ably defended himself;

27. This court notes that the particulars on the Charge Sheet clearly stated that the child was aged six (6) years which places it within the provisions of Section 8(1) of the Sexual Offences Act; and from the court record this court is satisfied that the appellant was at all material times aware of the charge brought against him and the particulars and that the essential elements of the offence had been disclosed to him; and finds that the omissions of Section 8(1) and that of the words **"as read with"** on the Charge Sheet are not fatal and are curable without causing any prejudice to the appellant and will occasion no miscarriage or failure of justice;

28. The ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the trial court properly conducted the 'voire dire' examination

29. The appellant contends that the '***voire dire***' examination was not properly conducted; the record indicates that the trial court asked the minor a number of questions and wrote the answers; the purpose of the questions were directed to establish whether the minor understood the nature and purpose of an oath and the need to tell the truth as required by the law; the record reflects the trial court's conclusion which was as follows;

> ***"I find that the child is very young but appears to be seized of sufficient intelligence to go through the motion of a trial. She has confirmed that she will speak the truth and believes in God and will therefore be affirmed;"***

30. This court is satisfied that the trial court made a correct conclusion that the minor was seized of sufficient intelligence to go through the trial and it had good reason to believe her evidence;

31. This ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the prosecution proved its case to the desired threshold;

32. The key ingredients for the offence of defilement are identification, penetration and age;

33. **On age**; this court notes that the Charge Sheet indicates the age of the minor as being six (6) years; when the '***voire dire***' examination was conducted the minor had stated that she was six (6) years of age; her evidence on her age was corroborated by the evidence of her mother (**PW2**) and the documentary medical evidence produced by the doctor (**PW6**) in the form of the P3Form which also indicated her age as being six (6) years;

34. This court finds no reason to interfere with the trial court's finding on the age of the complainant and also finds that despite the absence of a Birth Certificate, the medical evidence was sufficient proof in ascertaining the apparent age of the minor at the time of the incident; caselaw referred to **Francis Omuroni vs Uganda CR.A 2/2001;**

35. **On identification**; the evidence of **PW3** was that on the material date he saw the minor and the appellant together on the material date; his evidence was that he had known the appellant prior to the incident and had seen him on that material date at the shopping centre holding the minor's hand headed in the opposite direction to the child's home; he had also given a description of the clothes that the appellant was wearing on that date which description corroborated the evidence of **PW1** on the clothes worn by the appellant and found in his possession; **PW7** testified on how the minor pointed out the appellant and had given him details of the clothing worn on the material date which were found at the house the appellant resided and these clothes had assisted in his identification;

36. After carefully re-evaluating the prosecution evidence on identification this court is satisfied that the trial court properly analyzed the evidence on identification and this court finds no justifiable reason to interfere with the trial court's finding that the appellant was positively identified by **PW1** and **PW3** by way of recognition; and that the prosecution proved the ingredient of identification to the desired threshold;

37. **<u>On penetration;</u>** Penetration is defined under the provisions of Section 2 of the Act and it reads as follows;

> ***"Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"***

38. The complainant clearly described how she met the appellant on the material date when she had gone to buy milk; she gave a detailed account on how the appellant bought her a cake, held her hand and led her into a forest; where he removed her clothes and did bad manners to her; that he had pressed on her private parts and she felt a lot of pain and had screamed but the appellant had covered her mouth; the evidence of **PW3** places the appellant with the minor on that material time and date;

39. The P3Form presented by the clinical doctor (**PW6)** whose testimony was that upon examination of the minor he found bruises and dry blood on her genitalia and a 1cm tear extending from her vagina to her anus which was a sign of forced entry; he had also observed that the minor had difficulty in walking; after the examination the doctor findings was that the injuries were indicative of defilement;

40. This court is satisfied that the evidence of **PW1** which was corroborated by the medical evidence tendered by **PW6** sufficiently proved this element of penetration; and finds no reason to interfere with the trial court's finding that the appellant was the person who had defiled the minor.

41. This court finds that the three elements of defilement that is age, penetration and identification were proved by the prosecution to the desired threshold;

42. This ground of appeal is found lacking in merit and it is hereby disallowed.

<u>Whether the sentence was manifestly harsh and excessive in the circumstances;</u>

43. It is now settled law that the sentencing of an accused person is a matter that lies in the discretion of the trial court; and that the mandatory provisions of law must not be interpreted in a manner so as to take away the discretion of the court when sentencing; reference is made to the cases of **Dismus Wafula vs Republic (2018) eKLR** and **Muruatetu vs Republic [2017] eKLR;** in the latter case the Supreme Court declared that a mandatory sentence denies an accused person the right to mitigate and also takes away the trial court's discretion when sentencing;

44. Therefore, a court of law should be left to freely exercise its discretion and the sentence imposed by the trial court should be dependent on the facts and circumstances of each case;

45. This court reiterates the fact that the sentence must in the end depend upon the particular facts and circumstance of that case; there is no doubt that the trial court's hands were tied by the Section 8(2) which sets out the mandatory sentence and therefore the court was unable to exercise its discretion and thereby accorded the maximum sentence to the appellant, who was a first offender;

46. The maximum mandatory sentence is found not to be justified for a first offender; and in the circumstances it is found to be manifestly harsh and excessive and therefore warrants interference by this court;

<u>FINDINGS & DETERMINATION</u>

47. In the light of the forgoing this court makes the following findings and determinations;

> (i) This court finds that the Charge Sheet was not fatally defective and any omissions are hereby cured to read **'Section 8(1) as read with Section 8(2)'**
>
> (ii) The trial court is found to have properly conducted the '**voire dire**' examination;
>
> (iii) The prosecution is found to have proved its case to the desired threshold; the conviction is found to be safe and it is hereby upheld;
>
> (iv) The sentence imposed though legal is found to be manifestly harsh and excessive in the circumstances; the life sentence is hereby set aside and substituted with a term of thirty-five (35) years imprisonment; the time spent in remand be reduced from the term;

Orders accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 29th day of October, 2020.

HON.A.MSHILA

JUDGE